Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHILLIP ANTHONY CARR,

Petitioner,

—v.—

JOHN ASHCROFT, Attorney General of the United States; MICHAEL J. GARCIA, Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; JAMES JOHNSTON, Field Director of the U.S. Immigration and Customs Enforcement, New Orleans District Office; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF JUSTICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case involves issues left open by this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which is whether amendments from 1996 to the Immigration and Nationality Act should be applied retroactively to deny an alien a defense from deportation due to criminal acts he committed prior to the enactment of those laws. This case involves important issues regarding decisions of this Court relating to the retroactive application of civil statutes, and not just immigration law. Petitioner, an alien with lawful permanent resident status, engaged in criminal conduct prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-546 (September 30, 1997). AEDPA § 440(d) placed limitations on the availability of a form of relief from deportation proceedings found in former Immigration Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). IIRIRA completely repealed INA § 212(c). Mr. Carr committed a criminal offense in 1995, but did not plead guilty until after the enactment of AEDPA, but before the enactment of IIRIRA. The Immigration Judge and the Board of Immigration Appeals found that Mr. Carr was barred from applying for 212(c) relief. Mr. Carr filed a *habeas corpus* petition challenging his removal order. Both the district court and the court of appeals upheld his removal order. The question presented is:

Whether the court of appeals erred when it applied AEDPA § 440(d) and IIRIRA § 304(b) retroactively to

hold that the Petitioner, whose deportable criminal conduct occurred prior to the statutes' enactments, but whose guilty plea was entered into after the enactment of AEDPA, but before IIRIRA, is ineligible for a waiver of deportation under INA § 212(c).

PARTIES TO THE PROCEEDINGS

The Petitioner is Phillip Anthony Carr.

The Respondents are John Ashcroft, the Attorney General of the United States; Michael Garcia, the Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; James Johnston, Field Director of the U.S. Immigration and Customs Enforcement, New Orleans District Office; U.S. Immigration and Customs Enforcement; and the U.S. Department of Justice.[1]

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[1] The action below listed the following Respondents: Janet Reno, the former Attorney General of the United States; Kevin D. Rooney, the former Acting Commissioner of the Immigration and Naturalization Service; Lynn Underdown, the Louisiana District Director, Immigration and Naturalization Service; the Immigration and Naturalization Service, and the U.S. Department of Justice. Pursuant to FED. R. APP. P. 43(c)(2), John Ashcroft substituted Janet Reno as the Attorney General, and James Johnston substituted Lynne Underdown as the Louisiana District Director, however, his title is now Field Director of U.S. Immigration and Customs Enforcement. Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296) (January 24, 2003), Michael J. Garcia, Acting Assistant Secretary of U.S. Immigration and Customs Enforcement ("ICE") substituted Kevin D. Rooney, James Johnston replaced Lynne Underdown, however, his title is now the Field Director of the U.S. ICE, and the U.S. ICE substituted for the Immigration and Naturalization Service. U.S. Department of Justice is still a Respondent in this matter.

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PETITION FOR A WRIT OF *CERTIORARI*

Phillip Anthony Carr respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, which dismissed Mr. Carr's appeal (App. 1a)[2] and the order denying his petition for rehearing and hearing *en banc* are not reported (App. 27a). However, the dismissal of the appeal is available on Westlaw. *See Carr v. Reno*, No. 01-2270, 2002 WL 24144 (2d Cir. Jan. 4, 2002). The opinion and order of the district court is not reported. (App. 6a). The decision and order of the Immigration Judge (App. 24a) and Board of Immigration Appeals are unreported (App. 19a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on January 4, 2002. On February 20, 2002, Mr. Carr timely filed a petition for rehearing and rehearing *en banc*. The petition for rehearing and rehearing *en banc* was denied on August 27, 2003.

STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (App. 29a), section 440(d) of Antiterrorism and Effective Death Penalty Act

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2 "App." refers to the appendix attached to this petition.

("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (App. 29a-30a), former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (1997), as amended by AEDPA § 440(d) (repealed) (App. 30a), and section 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996) (App. 30a). This matter does not involve any Constitutional provisions.

STATEMENT OF THE CASE

I. STATUTORY AND CASE LAW BACKGROUND

For decades prior to the immigration law amendments of 1996, lawful permanent resident immigrants charged with committing a crime had a statutory right to seek a waiver of any resulting charge of excludability or deportability under INA § 212(c), provided the immigrant had been lawfully domiciled in the United States for seven years. *See* former INA 212(c), 8 U.S.C. 1182(c) (1994), as added by Immigration and Nationality Act of 1952; *see also Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976) (adopting and applying the *Francis* holding nationwide). The 212(c) waiver was unavailable only for individuals convicted of "aggravated felonies" for which they had served five or more years in prison. *See* former INA § 212(c), 8 U.S.C. 1182(c) (1994).

In 1996, Congress amended the Immigration and Nationality Act twice. First, in AEDPA § 440(d), Congress barred 212(c) waivers for several categories of criminal offenses. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Subsequently, in IIRIRA § 304(b), Congress

repealed 212(c) and replaced it with a form of relief called cancellation of removal that is unavailable for individuals convicted of any aggravated felony, regardless of time served. INA § 240A(a), 8 U.S.C. § 1229b(a) (Supp. V 1999).

In 1998, the Second Circuit held that Congress did not intend for AEDPA § 440(d) to be applied in deportation cases that were pending when AEDPA was enacted. *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom Reno v. Navas*, 526 U.S. 1004 (1999). In September 2000, after finding Congress' intent unclear with respect to the application of AEDPA § 440(d) and IIRIRA § 304(b) to pre-enactment convictions in deportation cases not yet pending on the effective dates of these laws, the Second Circuit applied the traditional presumption against retroactive application of a new civil statute and held that the AEDPA and IIRIRA bars to applying for 212(c) relief do not extend to a lawful permanent resident who pleaded guilty or *nolo contendere* to an otherwise qualifying crime prior to the enactment dates of these laws. *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, *INS v. St. Cyr*, 533 U.S. 289 (2001). The Second Circuit's decision in *St. Cyr* included a brief discussion, not necessary to the holding of that case, suggesting that the AEDPA and IIRIRA bars may otherwise be permissibly applied to pre-enactment conduct. *Id.* at 419. Prior to *St. Cyr*, several district courts within the Second Circuit had concluded that AEDPA and IIRIRA could not be applied retroactively to criminal conduct that had occurred prior to the enactment of those statutes. *See Pottinger v. Reno*, 51 F. Supp.2d 349, 362 (E.D.N.Y. 1999); *Maria v. McElroy*, 68 F.2d 206, 229-230 (E.D.N.Y. 1999); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 365-66 (E.D.N.Y. 2000). On appeal, the Supreme Court upheld the Second Circuit's holding that the AEDPA and IIRIRA bars do not apply to

pre-enactment pleas, but did not address the lower Court's dicta regarding the application of the statutes to pre-enactment conduct. *INS v. St. Cyr*, 533 U.S. 289 (2001).

In this case, the government seeks to apply AEDPA § 440(d) and IIRIRA § 304(b) to deny lawful permanent residents the statutory right to seek 212(c) relief to waive the deportation consequences of offenses committed prior to the effective dates of these laws. While *INS v. St. Cyr* was pending before the Supreme Court, the Second Circuit held in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), that the AEDPA and IIRIRA bars may be applied to individuals whose underlying criminal conduct occurred before the enactment of the 1996 immigration law amendments, but whose convictions occurred post-enactment. *Id.* at 86.

In reaching its holding, the *Domond* Court reasoned that because 212(c) waivers are a form of discretionary relief, their loss "does not impose a new legal consequence on [an alien's] pre-AEDPA criminal conduct." *Id.* at 85-86. However, the Supreme Court held in *St. Cyr* that the loss of a "significant likelihood of receiving § 212(c) relief," even though such relief is discretionary, constitutes a new legal effect that is impermissibly retroactive. 533 U.S. at 321-25. The Supreme Court's holding directly contradicts the rationale of the *Domond* decision.

The Second Circuit's decision in the case at hand was the first case to address the viability of *Domond* after this Court's decision in *St. Cyr*. (App. 3a). The panel in *Carr* issued a summary order, which is not a precedent decision. The next case to address the viability of *Domond* was *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002). This decision vacated a stay of removal issued by Judge Gleeson in *Mohammed v. Reno*, 205 F. Supp.2d 39

(E.D.N.Y. 2002), *stay vacated*, 309 F.3d 95 (2d Cir. 2002). Judge Gleeson followed *Domond*, but called its holding into question and granted a stay of removal to Mr. Mohammed, so that he could appeal his decision. The Second Circuit's decision in *Mohammed* was a decision on whether to maintain the stay. The merits of the case were not fully briefed. The *Mohammed* panel held that "at least for purposes of considering the pending motion to lift the stay, that *Domond* remains binding authority in this Circuit." 309 F.3d at 7. Based upon the language used, the *Mohammed* panel did not intend for its decision to be the final word on this issue. The next case, *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2002), cited *Mohammed* without any mention of *Domond*. *Rankine* involved a completely different issue than the case at hand. *Rankine* involved whether the limitations on § 212(c) relief created by the AEDPA and IIRIRA could be applied retroactively to aliens that were convicted by trial prior to the enactment of AEDPA and IIRIRA. In its analysis that there was no impermissible retroactive application to aliens who went to trial, the *Rankine* Court cited to *Mohammed*. 319 F.3d at 100. As a result of the *Rankine* panel merely citing to *Mohammed*, the panels in *Beharry v. Ashcroft*, 329 F.3d 51, 63 (2d Cir. 2003), and *Hibbert v. Ashcroft*, No. 02-2281, 2003 WL 21466746 (2d Cir. June 20, 2003) have cited to *Rankine* for the proposition that *Domond* remains good law.

II. ADMINISTRATIVE PROCEEDINGS

Petitioner, Phillip Anthony Carr, is a forty-four year old male, native and citizen of Jamaica. He was admitted to the United States as a lawful permanent resident on September 27, 1969, when he was only ten years old. He had permanent resident status for thirty years prior to the issuance of his removal order. Mr. Carr's entire fam-

ily is in the United States. His wife and four children are U.S. citizens, as are his mother and seven siblings.

Mr. Carr has three criminal convictions. On March 29, 1984, Mr. Carr pleaded guilty to criminal possession of marijuana in the fourth degree in violation of N.Y. PENAL LAW § 221.15. He paid a $250 fine. On October 1, 1987, Mr. Carr pleaded guilty to criminal sale of marijuana in the fourth degree in violation of N.Y. PENAL LAW § 221.40. He paid a $300 fine. On May 10, 1996, he pleaded guilty to felony possession of marijuana in violation of article 27, section 286 of the Annotated Maryland Code. The criminal conduct occurred on December 14, 1995. He was sentenced to five years imprisonment, but he served forty months.

III. REMOVAL PROCEEDINGS BEFORE THE IMMIGRATION COURT AND THE BOARD OF IMMIGRATION APPEALS

On June 23, 1998, the Immigration and Naturalization Service (now known as the U.S. Immigration and Customs Enforcement) issued a notice to appear ("NTA"), charging Mr. Carr with deportability for having committed an aggravated felony based on his convictions, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. V 1999), and for having committed a controlled substance violation, INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. V 1999).

On July 22, 1999, the Immigration Judge ("IJ") found Mr. Carr removable from the United States based on his criminal convictions and ordered him removed to Jamaica. (App. 25a). Mr. Carr appealed the IJ's decision to the Board of Immigration Appeals ("Board"). On February 3, 2000, the Board dismissed his appeal, holding that he is statutorily ineligible for relief from deportation pursuant to INA § 212(c), 8 U.S.C. § 1182(c)

(1994) (repealed), in light of 1996 amendments to the INA. (App. 19a).

IV. *HABEAS CORPUS* PETITION

Mr. Carr filed a *habeas corpus* petition pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of New York. The *habeas corpus* petition challenged the retroactive applications of section 440(d) of the AEDPA, and section 304(b) of IIRIRA, to preclude Mr. Carr from 212(c) relief. On May 1, 2001, the district court issued an opinion and order denying the *habeas corpus* petition. (App. 6a). The district court held that it was bound by the Second Circuit's decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001). (App. 14a).

V. APPEAL OF THE DISTRICT COURT'S *HABEAS CORPUS* ORDER

On May 22, 2001, Mr. Carr filed an appeal with the United States Court of Appeals for the Second Circuit. On January 4, 2002, the Second Circuit summarily affirmed the decision of the district court and dismissed Mr. Carr's appeal. (App. 2a).

VI. PETITIONS FOR A REHEARING AND REHEARING *EN BANC*

On February 20, 2002, Mr. Carr filed with the Second Circuit, petitions for a rehearing and rehearing *en banc*. On August 27, 2003, the Second Circuit denied Mr. Carr's petitions. (App. 27a). The instant petition for *certiorari* seeks review of that court of appeals judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *INS v. ST. CYR*, 533 U.S. 289 (2001), HAS OVERRULED THE SECOND CIRCUIT'S DECISION IN *DOMOND v. ASHCROFT*, 244 F.3d 81 (2d Cir. 2001)

The Court should grant the petition for *certiorari* because the decision relied upon by the Second Circuit to deny Mr. Carr's *habeas corpus* petition has been implicitly overturned by this Court's decision in *St. Cyr*. This Court held in *St. Cyr* that despite the discretionary nature of section 212(c), its elimination does have legal consequences, and thus, impermissible retroactive effect. *Id*. The Supreme Court stated, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." *Id*.

By contrast, in *Domond* the Second Circuit held that the limitations on 212(c) relief created by AEDPA § 440(d) do not have retroactive effect because 212(c) relief is discretionary. 244 F.3d at 85-86. Logic dictates that this Court's decision in *St. Cyr* cannot contradict *Domond*, yet not undermine *Domond*. In *Mohammed v. Reno*, United States District Court Judge John Gleeson of the Eastern District of New York recognized that *St. Cyr* conflicts with *Domond* because this Court held that taking away discretionary relief can have a retroactive effect. 205 F. Supp.2d at 44-45. However, in *Mohammed*, the Second Circuit gave the following rationalization as to why *Domond* has not been overturned:

> We think the *Domond* quotation has been taken too literally. The panel was obviously aware that, prior to AEDPA, section 212(c) relief often spared an alien from

> being removed from this country. The panel's statement is properly understood to mean only that an order for deportation was always imposed, even though not always carried out. In any event, the Supreme Court's focus on the shift from possible to certain deportation was explicitly tied to the alien's reliance on the prior availability of discretionary relief in deciding to plead guilty.

309 F.3d at 103.

The reasoning of the *Mohammed* panel is a *post hoc* rationalization. Moreover, the Second Circuit's decision in *Mohammed* is flawed because reliance is not the sole determinative factor in deciding whether a statute has an impermissible retroactive effect.

II. THIS COURT HAS NEVER REQUIRED THAT THERE ONLY BE RELIANCE IN ORDER FOR A STATUTE TO BE IMPERMISSIBLY RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has misinterpreted this Court's decision in *INS v. St. Cyr*. In *INS v. St. Cyr*, this Court stated that, "(a)s we have repeatedly counseled, the judgment whether a particular statute acts retroactively 'should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' " 533 U.S. at 321 (quoting *Martin v. Hadix*, 527 U.S. 343, 57-58 (1999) (in turn quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). But in *Domond* and its progeny, the Second Circuit has read these words as if "fair notice," "reasonable reliance," and "settled expectations" were synonymous. As a result of its misreading of *St. Cyr*, the Second Cir-

cuit is only considering whether there was reliance, in order to find that a statute is impermissibly retroactive under the second tier of the *Landgraf* test. Moreover, the Second Circuit seems to be requiring that there be a *quid pro quo*, as well. *See e.g.*, *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2002) ("If they had pled guilty, petitioners would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial, that gave rise to the reliance interest emphasized by the Supreme Court in *St. Cyr.*"). These are requirements that this Court has never imposed. The *St. Cyr* Court was just observing that there was reliance and a *quid pro quo* present in Mr. St. Cyr's case. The Court did not hold that reliance and a *quid pro quo* were required, in order to show that a statute has an impermissible retroactive effect.

The Second Circuit's requirement of a reliance and a *quid pro quo* would result in a different outcome in *Landgraf*, 511 U.S. 244 (1994) and *Rivers v. Roadway Exp. Inc.*, 511 U.S. 298 (1994). This is because there was no reliance or *quid pro quo* in *Landgraf* and *Rivers*. In both of these cases, this Court held that statutes, which increased civil liability, could not be applied retroactively to pre-enactment conduct. Applying the Second Circuit's logic in *Domond*, it would "border on the absurd" to believe that tortfeasors would refrain from tortious conduct, if they knew their monetary liability would be increased at a later date. In other words, the outcome would be different. *St. Cyr* did not intend to overrule these cases.

III. THE SECOND CIRCUIT FAILED TO RECOGNIZE THAT THIS COURT ROUTINELY UTILIZES ANALYSIS FROM *EX POST FACTO* CASES IN DETERMINING WHETHER A STATUTE IS IMPERMISSIBLY RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has refused to utilize *Ex Post Facto* analysis in *Domond* and its progeny. Because of this, the Second Circuit's retroactivity analysis is different from this Court's analysis. The Second Circuit was correct in *Domond* that the *Ex Post Facto* Clause of the Constitution does not apply to immigration proceedings. 244 F.3d at 87. However, in doing so, the Second Circuit ignored the fact that this Court regularly looks to *Ex Post Facto* cases by analogy when determining the retroactive effect of a civil statute. *See, e.g.*, *Hughes Aircraft v. Ex. Rel. Schumer*, 520 U.S. 939, 948 (1997) (*citing Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)); *Landgraf*, 511 U.S. at 269 n.23 (*citing Miller v. Florida*, 482 U.S. 423 (1987)). In fact, this Court relied upon an *Ex Post Facto* case, *Lindsey v. Washington*, 301 U.S. 397 (1937), in its decision in *INS v. St. Cyr*. 533 U.S. at 325.

The term "fair notice," which is one of the three retroactivity benchmarks mentioned in *St. Cyr*, originated in this Court's *Ex Post Facto* cases. *See, e.g.*, *Lynce v. Mathis*, 519 U.S. 433 (1997) ("this Court has consistently stressed 'lack of *fair notice*' as one of the 'central concerns of the *Ex Post Facto* Clause.' ") (emphasis added) (*quoting Weaver v. Graham*, 450 U.S. 24, 30 (1981)); *accord Carmell v. Texas*, 529 U.S. 513, 566 (2000); *Miller v. Florida*, 482 U.S. 423, 430 (1987). In fact, "fair notice" is the benchmark in the Second Cir-

cuit's *Ex Post Facto* cases. *See e.g.*, *U.S. v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994) ("One of the principal aims of the *Ex Post Facto* clause is to ensure that individuals have *fair notice* of what conduct is criminally proscribed"). (emphasis added); *U.S. v. Minicone*, 960 F.2d 1099, 1111 (2d Cir. 1992) (noting that the purpose of the *Ex Post Facto* clause is both reliance and fair notice). Since this Court's decision in *St. Cyr* considered one of the three benchmarks for determining retroactivity to be "fair notice," this Court was essentially stating that *Ex Post Facto* cases are to be looked at in determining whether a statute is impermissibly retroactive.

This Court's retroactivity analysis in criminal *Ex Post Facto* cases offers the most straight forward and functional approach to determining retroactive effect. It looks at the date of the alleged criminal conduct to analyze whether new laws have retroactive effect. The date of conduct is an appropriate yardstick because it provides a clear and enforceable test that avoids the need for a case by case review of the retroactivity issue.

In addressing whether AEDPA § 440(d) has an impermissible retroactive effect for pre-enactment conduct, the Second Circuit in *St. Cyr* stated it would "border on the absurd to argue that" aliens would not have committed crimes if they knew discretionary relief from deportation would not be available. 229 F.3d at 418. It would not, however, border on the absurd not to apply AEDPA and IIRIRA retroactively under *Ex Post Facto* analysis as employed by this Court. Thus, because the Second Circuit is not properly applying this Court's precedents, the Second Circuit is not deciding its retroactivity cases properly.

IV. THE SECOND CIRCUIT FAILED TO FOLLOW THIS COURT'S HOLDING IN *HUGHES AIRCRAFT v. EX. REL. SCHUMER*, 520 U.S. 939 (1997), THAT THE ELIMINATION OF A DEFENSE IN CIVIL PROCEEDINGS HAS AN IMPERMISSIBLE RETROACTIVE EFFECT

The Court should grant the petition for *certiorari* because the Second Circuit's decision is inconsistent with this Court's decision in *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997). In *Hughes Aircraft Co.*, the Court found retroactive effect when a 1986 amendment was applied to a case submitted prior to the amendment's adoption, causing a private party to lose a defense against private suits for submitting a false claim to the government. Elimination of the defense in question technically did not increase the defendant's liability exposure because the defense had never been available in suits brought by government litigators. The Court stated that "while we acknowledge that the monetary liability faced by [this] defendant is the same whether the action is brought by the Government or a *qui tam* relator, the 1986 amendment eliminates a defense to a *qui tam* suit—prior disclosure to the Government—and therefore changes the substance of the existing cause of action . . . by '*attaching a new disability, in respect to transactions or considerations already past.*' " *Id.* at 948 (*quoting Landgraf*, 511 U.S. at 269) (emphasis added). The new disability is the deprivation of a prior defense.

The application of AEDPA § 440(d) or IIRIRA § 304(b) to a non-citizen who committed a prior criminal offense would have a retroactive effect similar to that in *Hughes Aircraft*. The elimination of the right to apply for section 212(c) relief, like the elimination of the prior government disclosure defense in *Hughes Aircraft*, does

not change the magnitude of the Petitioner's potential liability. It does, however, increase the likelihood that this liability, i.e., deportation, will be imposed, and it does so by eliminating prior available relief.

V. THE SECOND CIRCUIT IGNORED THE PLAIN LANGUAGE OF AEDPA § 440(d), WHICH CLEARLY INDICATES THAT IT DOES NOT APPLY TO PRE-ENACTMENT CONDUCT

The Court should grant the petition for *certiorari* because the Second Circuit has incorrectly interpreted AEDPA § 440(d). The *Domond* Court incorrectly stated without elaboration that it is a conviction that renders an alien ineligible for 212(c). 244 F.3d at 85–86. This goes against the plain language of AEDPA § 440(d), which provides that 212(c) relief is no longer available "to an alien who is deportable by reason of having *committed* any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D) [of the INA], or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i) [of the INA]," (emphasis added). The use of the word "committed" indicates that AEDPA should not be applied retroactively to criminal conduct prior to AEDPA's enactment. The use of the word, "committed," in AEDPA § 440(d) to determine who is ineligible for 212(c) is at total odds with the Second Circuit's statement in *Domond* that a "conviction" determines who is ineligible for 212(c). Since the plain language of AEDPA § 440(d) does not apply to pre-enactment conduct, AEDPA is not a bar to Mr. Carr's eligibility for 212(c) relief. Since Mr. Carr's plea was prior to the enactment of IIRIRA, IIRIRA should not be applied retroactively to Mr. Carr based upon the principles enunciated by this Court in *St. Cyr*.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-2270
Filed January 4, 2002

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourth day of January, Two Thousand Two.

PRESENT: HONORABLE James L. Oakes,
HONORABLE Richard J. Cardamone,
HONORABLE Fred I. Parker,
Circuit Judges.

PHILLIP ANTHONY CARR,

Petitioner-Appellant,

—v.—

JANET RENO, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWN, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; U.S. DEPARTMENT OF JUSTICE,

Respondents-Appellees.

APPEARING FOR APPELLANT: Alan Michael Strauss
Bretz & Coven, LLP
New York, New York

APPEARING FOR APPELLEES: Steven J. Kim
U.S. Attorney's Office
Eastern District of
New York
Brooklyn, New York

Appeal from the United States District Court for the Eastern District of New York (Kahn, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the denial of the petition for a writ of habeas corpus by said district court be and it hereby is AFFIRMED.

Petitioner-Appellant Phillip Anthony Carr ("Carr") appeals from the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York (Kahn, J.). We affirm.

The issue in this appeal was squarely addressed in an opinion of this Court issued earlier this year. Carr argues that § 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, has an impermissibly retroactive effect as applied to aliens like him whose criminal conduct pre-dated the AEDPA's enactment date, even though his conviction post-dated the AEDPA's enactment date. In *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), we held that § 440(d) does not have an impermissibly retroactive effect as applied to aliens whose criminal conduct pre-dated the AEDPA's enactment date but whose convictions post-dated the AEDPA's enactment date. The Supreme Court's subsequent affirmance of our decision in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 233 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), which addressed the impermissibly retroactive effect of § 440(d) as applied to aliens whose guilty pleas pre-dated the AEDPA's enactment date, does not undermine *Domond*. Accordingly, the district court properly denied Carr's petition.

For the reasons set forth above, the denial of the petition for a writ of habeas corpus entered by the district court is AFFIRMED.

FOR THE COURT
Roseann B. MacKechnie, Clerk

By: /s/ LUCILLE CARR
Lucille Carr, Operations Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-7306 (ARR)
Filed May 9, 2001

PHILLIP ANTONY CARR,

Petitioner/Plaintiff,

—against—

JOHN ASHCROFT, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWNE, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE,

Respondents/Defendants.

JUDGMENT

An Order and Opinion of the Honorable Allyne R. Ross, United States District Judge, having been filed on May 7, 2001, denying the petition for a writ of habeas corpus; and lifting the order staying petitioner's removal; it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondents; that the petition for a writ of habeas corpus is denied; and, that the order staying petitioner's removal is lifted.

Dated: Brooklyn, New York
May 7, 2001

/s/ ROBERT C. HEINEMANN
ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-7306 (ARR)

NOT FOR PUBLICATION

PHILLIP ANTONY CARR,

Petitioner/Plaintiff,

—against—

JOHN ASHCROFT, Attorney General of the United States; KEVIN D. ROONEY, Acting Commissioner of the Immigration and Naturalization Service; LYNN UNDERDOWNE, Louisiana District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE,

Respondents/Defendants.

OPINION AND ORDER

ROSS, United States District Judge:

Petitioner brings this petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241, requesting that the court review the lawfulness of his mandatory detention without bond pursuant to 8 U.S.C. § 1231(a) and the statutory applicability and constitutionality of § 304(b) of the

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996) ("IIRIRA") and § 440(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA").[1] Specifically, petitioner argues that Congress did not intend that either § 304(b) of IIRIRA or § 440(d) of AEDPA apply retroactively and that, alternatively, application of either provision to petitioner's criminal conduct which occurred prior to the enactment of either statute would have an impermissible retroactive effect. He also alleges that such application would violate his Equal Protection and Due Process rights. In addition, petitioner argues that his mandatory detention without a bond hearing violates his Fifth Amendment procedural due process rights.

Respondents argue that only Lynn Underdowne, District Director of the Immigration and Naturalization Service ("INS") in Louisiana, is the appropriate respondent in this case, and that this court lacks personal jurisdiction over her under New York's long-arm statute. As such, the respondents argues that the proper venue for this action is the Western District of Louisiana. Respondent also argue that this court lacks subject matter jurisdiction to hear petitioner's request for habeas relief, asserting that both AEDPA and IIRIRA dictate that courts of appeals have exclusive judicial review over agency decisions rendered under these acts. In addition, the respondent argues that petitioner is ineligible to apply for discretionary relief from deportation because he is subject to the permanent rules under IIRIRA and

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[1] Petitioner originally challenged his mandatory detention under § 236(c) as violating his substantive due process rights. In his first reply brief, he amends this claim, noting that a recent clarification by the Immigration and Naturalization Service renders him detained under § 241.

does not qualify for "cancellation of removal" under § 304(b). Finally, respondent argues that petitioner does not possess a fundamental right to be free from INS detention, and that the mandatory detention provision of IIRIRA is rationally related to a legitimate government purpose and, thus, is constitutional.[2]

Prior to assessing the merits of Mr. Carr's petition, the court indicated to the parties that it would withhold any ruling on the petition until the Supreme Court and the Second Circuit had weighed in on the issue of the retroactivity of AEDPA and IIRIRA in *St. Cyr v. I.N.S.*, 229 F.3d 406 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 848 (Jan. 12, 2001) and *Pena-Rosario v. Reno*, 83 F. Supp.2d 349 (E.D.N.Y. 2000), respectively. However, since that time, the Second Circuit has issued an opinion directly on point with regard to the retroactivity issue and, as such, the court proceeds to address the merits of the petition. For the following reasons, the court holds that (1) it possesses personal jurisdiction over respondents; (2) it retains subject matter jurisdiction over this habeas petition; (3) neither §304(b) of IIRIRA nor of § 440(d) of AEDPA is impermissibly retroactive as applied to petitioner, when he pleaded guilty to an "aggravated felony" rendering him subject to removal proceedings after the enactment of AEDPA, even though the criminal conduct occurred prior to the statute's

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[2] In his initial petition, Mr. Carr argued that his mandatory detention violated his substantive due process rights. Once the court appointed Mr. Carr counsel, he altered this claim to assert that his continued detention without a bond hearing before an impartial adjudicator violates his procedural due process rights. In a supplemental reply brief, Respondent asserted that petitioner was not entitled to such relief, and that the review process in place sufficiently afforded petitioner any procedural due process protection to which he was entitled.

enactment; (4) petitioner's procedural due process claim regarding his mandatory detention is moot.

BACKGROUND

Petitioner Phillip Anthony Carr is a forty year-old native and citizen of Jamaica. He entered the United States as a lawful permanent resident ("LPR") on September 27, 1969, when he was ten years old, and he has lived in the United States for the past thirty years. His entire family is in the United States, and his wife and four children are citizens of the United States, as are his mother and seven siblings. He was raised in New York, graduated from high school in New York, and has been employed in New York.

Mr. Carr has three criminal convictions. On March 29, 1984, he pleaded guilty to criminal possession of marijuana in the fourth degree in violation of N.Y. Penal Law § 221.15, a crime for which he paid a $250 fine. On October 1, 1987, Mr. Carr pleaded guilty to criminal sale of marijuana in the fourth degree in violation of N.Y. Penal Law § 221.40, for which he paid a $300 fine. Finally, on May 10, 1996, Mr. Carr pleaded guilty to felony possession of marijuana in violation of article 27, section 286 of the Annotated Maryland Code. The underlying criminal conduct leading to this conviction occurred on December 14, 1995. He was sentenced to five years imprisonment, but was released after forty months.

On June 23, 1998, the INS issued a notice to appear ("NTA") charging Mr. Carr with "deportability" for having committed an aggravated felony based on his convictions, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and for having committed a violation pertaining to a controlled substance, INA § 237(a)(2)(B)(i), 8 U.S.C.

§ 1227(a)(2)(B)(i). The INS assumed custody of Mr. Carr on April 12, 1999 and transferred him to its detention facility in Oakdale, Louisiana. On July 22, 1999, an immigration judge found Mr. Carr removable from the U.S. based on his criminal convictions and ordered him deported to Jamaica. Mr. Carr filed an appeal with the Board of Immigration Appeals ("BIA"), which dismissed his appeal on February 3, 2000, holding that § 440(d) of AEDPA and § 304(b) of IIRIRA rendered him ineligible for relief from deportation under § 212(c) of the INA, 8 U.S.C. § 1182(c) (repealed). On December 2, 1999, after Mr. Carr filed the instant habeas petition, this court instructed the government to show cause why petitioner's removal should not be stayed pending the disposition of his petition. By letter dated December 10, 1999, the government informed the court that Mr. Carr would remain in INS custody pending the court's ruling on his petition.

DISCUSSION

I. *JURISDICTIONAL ISSUES*

A. *The Court Can Reasonably Consider the Named Defendants Mr. Carr's Custodians for the Purpose of His Habeas Petition*

As a threshold matter, the court holds that Attorney General Ashcroft, Acting INS Commissioner Rooney, and INS District Director Underdowne are all "custodians" of Mr. Carr for the purpose of his habeas petition and, therefore, are appropriate respondents to this action.[3]

[3] Insofar as the government concedes that Ms. Underdowne is Mr. Carr's custodian and, thus, an appropriate respondent in this case, the court will only discuss the custodial roles of the Attorney General and Mr. Rooney.

A number of courts in this district, led by Judge Weinstein in *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), have held that the Attorney General is a "custodian" and appropriate respondent for habeas petitions of the nature at issue in this case. While the Second Circuit has yet to rule on this matter, the court finds Judge Weinstein's reasoning in *Mojica* is persuasive and holds that the Attorney General is a proper respondent for this habeas action. *See Mojica*, 970 F. Supp. at 166-67 (citing *Nwanko v. Reno*, 828 F. Supp. 171, 175-76 (E.D.N.Y. 1993)). *See also Pena-Rosario v. Reno*, 83 F. Supp.2d at 362; *Pottinger v. Reno*, 51 F. Supp.2d 349, 357 (E.D.N.Y. 1999).

The court also finds that, for the reasons set forth at length in *Mojica* regarding the appropriateness of naming the Attorney General as a Respondent, Acting Commissioner Rooney serves a similar "custodial" function for these purposes and is a proper respondent in this matter. *See also Agramonte v. Commissioner of I.N.S.*, 2000 WL 1617999 (S.D.N.Y. Oct. 30, 2000).

B. *Personal Jurisdiction*

The court also maintains personal jurisdiction over the Attorney General pursuant to New York's Long-Arm Statute. In order to maintain personal jurisdiction over non-domiciliary respondents or defendants under this statute, it is sufficient that the individuals regularly transact or conduct business in New York, even if the cause of action has no connection to the state. *See* N.Y.C.P.L.R. § 301. As Judge Weinstein noted in *Mojica*, because the Attorney General, in his official capacity, clearly transacts business in New York, he can be reached by the New York long-arm statute. *See Mojica*,

970 F. Supp. at 168 (citing *Nwanko*, 828 F. Supp. at 175-76). *See also Pottinger*, 51 F. Supp.2d at 357.[4]

C. *Subject Matter Jurisdiction*

The government contends that this court lacks subject matter jurisdiction over Mr. Carr's habeas petition, contending that the permanent IIRIRA rules codified by 8 U.S.C. § 1252 strip district courts of habeas jurisdiction over INS detention petitions and consolidate judicial review in the courts of appeal.[5] (Resp. Memo. of Law in Opp. to Petition for Writ of Habeas Corpus at 23-40). Since the government filed its brief, however, the Second Circuit has held that IIRIRA's permanent rules do not repeal district courts' habeas corpus jurisdiction to review legal challenges to final removal orders entered against LPRs deemed removable due to prior criminal convictions. *See Calcano-Martinez v. INS*, 2000 WL 1336611 (2d Cir. 2000), *cert. granted*, 121 S.Ct. 849 (2001); *St. Cyr v. INS*, 229 F.3d at 409. As such, the court has subject matter jurisdiction over Mr. Carr's habeas petition.

II. *RETROACTIVITY OF § 440(d) of AEDPA*

Mr. Carr argues that subjecting him to either § 304(b) of IIRIRA or § 440(d) of AEDPA, and thereby preclud-

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[4] Because the court finds that both the Attorney General is an appropriate respondent and that he is subject to the personal jurisdiction of this court, the court finds it unnecessary to determine whether or not it maintains personal jurisdiction over Acting INS Director Rooney or INS District Director Underdowne. *See Pena-Rosario*, 83 F. Supp.2d at 362 (citing *Moiica*, 970 F. Supp. at 166; *Yesil v. Reno*, 958 F. Supp. 828, 835-36 (S.D.N.Y. 1997)).

[5] The government also argues that Mr. Carr failed to exhaust his administrative remedies, because his BIA appeal was pending at the time the government filed its opposition brief. Since that time, however, the BIA dismissed Mr. Carr's appeal, rendering this issue moot.

ing him from seeking a waiver for deportation under § 212(c) of the INA, would constitute an impermissible retroactive application of these statutes to conduct he completed prior to their enactment. First, he argues that the language of these provisions indicates that Congress intended that they not apply retroactively. In the alternative, he argues that the language of these statutes does not manifest a clear congressional intent to apply them retroactively and, as such, the presumption against retroactivity prevails. Second, he argues that, were the court to find an absence of a clear congressional intent on the issue of retroactivity, subjecting him to these statutes would have an impermissible retroactive effect. Finally, he argues that subjecting him to these statutes would violate his substantive due process and equal protection rights.

At the time Mr. Carr filed his petition, the question of whether § 440(d) of AEDPA could apply retroactively to pre-enactment conduct when a defendant had been convicted or had pled guilty to a deportable offense *after* AEDPA's passage had yet to be decided by this circuit. The district courts that had addressed this issue had held that such an application was impermissibly retroactive and, as such, individuals in Mr. Carr's situation could not be denied eligibility for § 212(c) discretionary relief. *See Pena-Rosario*, 83 F. Supp.2d 349; *Dunbar*, 64 F. Supp.2d 47, 53 (D. Conn. 1999). In *St. Cyr*, the Second Circuit determined that retroactive application of § 440(d) of AEDPA to individuals who had pled guilty to deportable offenses prior to the enactment of the statute was impermissible, though it explicitly noted in strongly worded dicta that such retroactive application to pre-enactment *conduct* would not be impermissible. In light of these decisions, however, this court informed the parties that it would delay any decision on Mr. Carr's petition until

the matter had been addressed by the Second Circuit's review of *Pena-Rosario* or the Supreme Court's review of *St. Cyr*.

Since that time, however, the Second Circuit has reviewed the permissibility of retroactive application of § 440(d) to individuals whose deportable criminal conduct occurred prior to the statute's enactment but whose convictions or guilty pleas occurred after AEDPA was passed. In *Domond v. I.N.S.*, 2001 WL 282645 (2d Cir. March 23, 2001), the Second Circuit overturned the district court in *Dunbar* and held that AEDPA was not impermissibly retroactive in precluding petitioner's eligibility for § 212(c) relief when he committed his deportable offense in November 1994 but did not plead guilty until November 1996, after the passage of AEDPA. *See Domond*, 2001 WL 282645, at *4-5. Because Mr. Carr's circumstances are identical to those of the petitioner in *Domond* in all relevant respects, the court finds that *Domond* governs this case, and Mr. Carr's retroactivity argument fails.[6]

III. *PETITIONER'S SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS*

Mr. Carr asserts that, if these statutes do apply retroactively, they violate both his substantive due process and equal protection rights. These arguments, however, are without merit. As the petitioner concedes, in these circumstances, the retroactive application of these statutes would satisfy due process if supported by a "legitimate legislative purpose furthered by rational means." *See* Pet.

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[6] The court need not conduct a separate analysis of the permissibility of the retroactive effect of § 304(b) of IIRIRA. Even were IIRIRA deemed impermissibly retroactive as applied to petitioner, he would still be subject to § 440(d) of AEDPA.

Reply Memo. of Law at 43 (quoting *Pension Benefit Guaranty Corp.v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)) (internal quotations omitted). Similarly, petitioner's equal protection claim is analyzed under the rational basis test. *Seẽ Domond*, 2001 WL 282645, at *5 (citing *Francis v. I.N.S.*, 532 F.2d 268, 272 (2d Cir. 1976)).

The crux of petitioner's equal protection claim is that eligibility for § 212(c) relief could vary among similarly-situated individuals based on the purportedly irrational and arbitrary date on which the INS chooses to commence deportation or removal proceedings. Petitioner's ineligibility for § 212(c) relief, however, did not hinge on when he was placed in removal proceedings, but rather when he was convicted of an aggravated felony, which occurred *after* AEDPA's passage. *See Domond*, 2001 WL 282645, at *4. Congress had a legitimate purpose for limiting eligibility for § 212(c) relief for those convicted by trial or guilty plea after AEDPA's passage, namely "to enhance the ability of the United States to deport criminal aliens," and, as such, his equal protection claim fails. *Id.* at *6. For the same reason, petitioner's substantive due process claim fails as well.

IV. *PETITIONER'S PROCEDURAL DUE PROCESS CLAIM*

In his initial reply brief, petitioner argued that his detention pending his deportation pursuant to INA § 241, 8 U.S.C. § 1231, violates his procedural due process rights. A careful reading of the statutory scheme governing the detention of individuals such as Mr. Carr whose final administrative orders of deportation have been stayed pending judicial review indicates that Mr. Carr cannot raise this claim at this time. When an individual, like Mr. Carr, is convicted for an offense that falls under 8 U.S.C. § 1227(a)(2)(A)(iii) and is subject

to a final order of removal, he is mandatorily detained under INA § 236, 8 U.S.C. § 1226(c), for ninety days, during which time the INS is required to execute his removal. If the alien is not removed within ninety days, the INS district director may continue to hold the alien in custody, absent a clear and convincing showing by the alien that he does not pose a danger to the community nor poses a significant flight risk. *See* 8 C.F.R. § 241.1. This ninety-day period has been termed the "removal period." *See* 8 U.S.C. § 1231(a)(1). *See also Mamedov v. Reno*, 2000 WL 1041452, *2 (S.D.N.Y. July 28, 2000), vacated as moot, *Mamedov v. Reno*, 2000 WL 1154329 (S.D.N.Y. Aug. 14, 2000).

However, when an individual such as Mr. Carr seeks a stay of his removal pending judicial review of that order (in this case, prior to the end of the original removal period), the removal period is suspended and he remains detained pursuant to § 236. *See Rogowski v. Reno*, 94 F. Supp.2d 117, 181-82 (D. Conn. 1999) (alien facing administrative removal order due to violation falling under 8 U.S.C. § 1227(a)(2)(A)(iii) is detained pursuant to § 236 while judicial review of removal order is pending); *Martinez v. Greene*, 28 F. Supp.2d 1275, 1283-84 (D. Colo. 1998). When the court has reviewed and rejected the alien's challenge to his removal order, rendering such order final and enforceable, a new ninety-day removal period begins, during which the INS must effectuate the alien's removal. *See* 8 U.S.C. § 1231(a)(1)(B)(ii) ("If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien," the removal period begins on "the date of the court's final order.").

Mr. Carr challenges his detention under § 241 as a violation of his procedural due process rights, with an explicit focus on the sufficiency of the review mechanisms utilized to determine his eligibility for release on bail as

outlined in 8 C.F.R. § 241.4(c). *See* Pet. Reply Memo. of Law at 44-54; Pet. Supp. Reply Brief at 2-9. Because Mr. Carr's final administrative removal order was stayed pending this court's review of his eligibility for § 212(c) relief, and because I have determined that Mr. Carr is not eligible for such relief and that, therefore, his removal order is final and enforceable, the removal period commences today. The INS now has ninety days from the date of this order to remove Mr. Carr prior to his entitlement to a bond hearing under § 241(a)(6). As such, Mr. Carr's procedural due process claim is premature and is dismissed without prejudice. To the extent that the government fails to effectuate his removal within the ninety-day period and petitioner becomes eligible for discretionary release on bond, petitioner may re-institute his procedural due process claim. *See Michel v. INS*, 119 F. Supp.2d 485, 497 (M.D. Pa. 2000) (due process claim regarding review procedures in § 241 not ripe until ninety days after court rejected petitioner's challenge to his removal order and lifted stay of removal).

CONCLUSION

For the reasons stated above, plaintiffs petition for a writ of habeas corpus is denied. The order staying petitioner's removal is lifted.

The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

/s/ ALLYNE R. ROSS
Allyne R. Ross
United States District Judge

Dated: May 1, 2001
Brooklyn, New York

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cc: Magistrate Judge Pollak

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A18 417 739 - Oakdale

Date: February 3, 2000

In re: PHILLIP ANTHONY *CARR*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Mary Ann Berlin, Esquire

ON BEHALF OF SERVICE:

Lorraine L. Griffin
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: None

ORDER:

PER CURIAM. In a decision dated July 22, 1999, the Immigration Judge found the respondent removable as charged and concluded that he was ineligible for any form of relief from removal. The Immigration Judge therefore ordered the respondent removed from the United States to Jamaica. The respondent has appealed from this decision. The appeal is dismissed.

On appeal, the respondent has challenged the Immigration Judge's finding of removability. First, he contends that there is no evidence to show that the conviction records submitted by the Immigration and Naturalization Service pertain to him. However, the fact that the respondent's name is identical to that of the defendant named in the conviction records is sufficient, in the absence of any evidence to the contrary, to establish that he committed the offenses described. *See Matter of Lopez*, 15 I&N Dec. 183 (BIA 1975) (holding that identity of names between respondent and person named in record of conviction permits Immigration Judge to infer that the evidence relates to the respondent); *see also Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977); *Matter of Cheung*, 13 I&N Dec. 794 (BIA 1971). Accordingly, we find that the conviction records provide clear and convincing proof of the respondent's removability under sections 237(a)(2)(A)(iii) and (B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(i). *See* section 240(c)(3) of the Act, 8 U.S.C. § 1229a(c)(3).

The alleged "vagueness" of the conviction documents does not alter this conclusion, despite the respondent's contentions on appeal. The conviction records comply with the requirements set forth in section 240(c)(3)(B) of the Act and contain sufficient information to allow a reasonable person to conclude that the respondent was convicted of three controlled substance offenses. The

respondent claims that none of these offenses constitutes an aggravated felony as defined in section 101(a)(43)(B) of the Act, but we disagree with this claim. The respondent was convicted of criminal sale of marijuana in violation of NY Penal Code § 221.40. This crime qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c) since it is punishable as a felony under the Controlled Substance Act, 21 U.S.C. § 801 et seq, and therefore constitutes an aggravated felony as defined in section 101(a)(43)(B). *See Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995); 21 U.S.C. § 841; 18 U.S.C. § 3559(a). The fact that the offense is a misdemeanor in New York does not change this conclusion. *Compare Matter of K-V-D-*, Interim Decision 3422 (BIA 1999) (finding that federal definition of felony must be applied to offenses in immigration proceedings).

The respondent's second conviction for possession of a controlled substance also constitutes an aggravated felony under section 101(a)(43)(B) of the Act. *See Matter of K-V-D-, supra*; *Matter of L-G-, supra*. This crime, like the respondent's conviction for sale of marijuana, is punishable as a felony under the Controlled Substance Act and therefore constitutes a drug trafficking crime as defined in 18 U.S.C. § 924(c). *See* 21 U.S.C. § 844; 18 U.S.C. § 3559(a). We therefore concluded that the Immigration Judge acted properly in finding the respondent removable under section 237(a)(2)(A)(iii) of the Act. The fact that two of the respondent's three convictions occurred prior to the enactment of legislation making aggravated felonies grounds for deportation does not alter this conclusion. *See Matter of Truong*, Interim Decision 3416 (BIA 1999). Accordingly, we affirm the Immigration Judge's finding of removability.

In addition, we conclude that the Immigration Judge acted properly in finding the respondent ineligible for

cancellation of removal or a section 212(c) waiver. *See* section 240A(a)(3) (indicating that aggravated felony conviction renders alien ineligible for relief); section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, 110 Stat. 3009 ("IIRIRA") (repealing section 212(c) of the Act). Section 212(c) relief is not available in removal. proceedings and neither this Board nor the Immigration Judge has the authority to grant this form of relief despite the respondent's contentions to the contrary. We also have no jurisdiction to address the respondent's constitutional challenges to the laws we administer. *See e.g. Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). We therefore must uphold the Immigration Judge's decision and dismiss the respondent's appeal.

[ILLEGIBLE]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A18 417 739 – Oakdale

Date: February 3, 2000

In re: PHILLIP ANTHONY *CARR*

DISSENTING OPINION:

Lory Diana Rosenberg, Board Member

I respectfully dissent.

I agree fully with the respondent's well-argued brief, with the sole exception of his contention that a state offense for the sale of marijuana would not be a felony under federal law. *See Matter of K-V-D-*, Interim Decision 3422 (BIA 1999). However, I do not believe that offense is an aggravated felony for reasons stated in my separate opinion in *Matter of Lettman*, Interim Decision 3370 (BIA 1998). I also note that the respondent appears to have been moved from the New York or Baltimore area to Oakdale for purposes of detention.

Accordingly, I would apply the law of the circuit with jurisdiction over his place of residence. *See Henderson v. INS* 157 F.3d 106 (2d Cir. 1998).

/s/ LORY DIANA ROSENBERG
Lory Diana Rosenberg
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

File No.: A 18 417 739
July 22, 1999

In the Matter of

PHILLIP ANTHONY CARR,

Respondent

IN REMOVAL PROCEEDINGS

CHARGE:	Section 237 (a) (2) (B) (i) of the Immigration and Nationality Act; an alien convicted of a violation of any law or regulation relating to a controlled substance;
	Section 237(a) (2) (A) (iii) of the Immigration and Nationality Act; an alien convicted of an aggravated felony
APPLICATIONS:	Termination and cancellation of removal under Section 240A(a)

ON BEHALF OF RESPONDENT:

Mary Ann Berlin, Esquire
10 East Baltimore Street
Suite 901
Baltimore, Maryland 21202

ON BEHALF OF THE SERVICE:

Jerry Beatmann, Esquire
Assistant District Counsel
INS
Oakdale, Louisiana 71463

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Jamaica who was admitted to the United States as an immigrant on September 27, 1969. On March 29, 1984, he was convicted in the State of New York of the offense of possession of marijuana. On October 1, 1997, he was convicted in the Same State of the offense of sale of marijuana. On May 10, 1996, he was convicted in the State of Maryland for the offense of possession of marijuana.

In pleading to the Notice to Appear, counsel for the respondent admitted the first three allegations of fact contained therein. Allegation 4, 5, 6, and the charges of removability were denied. The hearing was continued to July 22nd, 1999 in order to receive evidence from the Service regarding the allegations which were denied.

When the hearing resumed on July 22nd, counsel for the Service offered three records of conviction which were received over the objection for counsel for the respondent as follows. Exhibit 2 is a certificate of disposition from the State of New York for the offense of possession of marijuana. Exhibit 3 is a certificate of disposition from the State of New York for the offense of

sale of marijuana. Exhibit 4 is a record of conviction from the state of Maryland for the offense of possession of marijuana. The respondent had argument on the issue of removability but offered no evidence. The respondent was found to be removable as charged.

As relief from removal, the respondent sought to apply for cancellation of removal. However, that relief is not available to an alien convicted of an aggravated felony. Therefore, the respondent is not eligible for the relief sought.

ORDER

IT IS HEREBY ORDERED it is ordered that the respondent be removed from the United States to Jamaica on the charges contained in the Notice to Appear.

CHARLES A. WIEGAND, III
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No: 01-2270
Filed August 27, 2003

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of August two thousand three.

PHILLIP ANTHONY CARR,

Petitioner-Appellant,

—v.—

JANET RENO, Attorney General of the United States, KEVIN D. ROONEY, Acting Commissioner, Immigration and Naturalization Service, LYNN UNDERDOWN, Louisiana District Director, Immigration and Naturalization Service, IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF JUSTICE,

Respondents-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Phillip Anthony Carr.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSANN B. MACKECHNIE, CLERK

By: /s/ ARTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

STATUTORY PROVISIONS INVOLVED

1. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1995).**

   Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

2. **Section 440(d) of Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).**

   CLASSES OF EXCLUDABLE ALIENS. –Section 212(c) of [the Immigration and Nationality Act]. . . is amended—

   (1) by striking "The first sentence of this" and inserting "this" ; and

   (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any

offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)."

3. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c), as amended by AEDPA § 440(d) (1997).**

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

4. **Section 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996)**

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.